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Dirty Assets

Emerging Issues in the Regulation of
Criminal and Terrorist Assets

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Chapter 2

Confiscation of the Proceeds of Crime: The European Union Framework

Matthias J. Borgers

Introduction

Opportunities for confiscating the proceeds of crime have been attracting increasing attention in the European Union. This attention manifests itself in three different ways. First, confiscation was mentioned as one of the methods for combating certain types of crime, such as money laundering, drug trafficking, defrauding community funds and organized crime. This is reflected in various legislative instruments which recommend provisions for confiscation.¹ Second, the recovery of criminal money is increasingly seen as an independent issue not linked to a specific type of crime. This is evidenced, *inter alia*, by the Framework Decision on confiscation, which requires member states to put in place effective legislation for confiscation with respect to a variety of criminal acts.² Similarly, attention is also being paid to international cooperation in confiscation cases, as evidenced by the Framework Decision on the execution in the European Union of orders freezing property or evidence³ and the Framework Decision on the execution in the European Union of confiscation orders.⁴ Finally, confiscation and confiscation legislation are also seen as part of the efforts to combat terrorist financing.⁵

This chapter provides an overview of the European Union's various legal instruments and initiatives that are of importance to international cooperation in confiscation cases. Legal instruments specifically aimed at confiscation cases, as well as other regulations relevant to cooperation, will be discussed. Where

1 For a detailed overview see Gilmore, W.C., *Dirty Money. The Evolution of International Measures to Counter Money Laundering and the Financing of Terrorism* (4th ed., Strasbourg: Council of Europe, 2011).

2 Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders.

3 Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence.

4 Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders.

5 See the European Council 'Declaration on combating terrorism' of 25 March 2004, Council document 7906/04, especially part 5(a), and 'The fight against terrorist financing' of 9 December 2004, Council document 14180/4/04, parts 14, 15 and 27.

possible, based on EU evaluations, the chapter will indicate the working of these legal instruments to date. Using this overview, the chapter will identify a system of standards and benchmarks that are, or should be, applied within the European Union as standards, or minimum standards, for proper international cooperation in confiscation cases. Finally, the chapter will briefly discuss developments that can be expected in the near future.

Initiatives and Instruments Specifically Aimed at Confiscation Cases

Joint Action on Money Laundering

The first instrument specifically aimed at confiscation cases is the Council of the European Union's Joint Action regarding money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime ('Joint Action').⁶ The Joint Action was a result of the Action Plan for combating organized crime.⁷ One of the recommendations of this Action Plan concerns efforts to strengthen the tracing and seizure of illegal assets and the enforcement of court decisions on asset confiscations.

The preamble of the Joint Action on money laundering states, *inter alia*, that mutually compatible practices make cooperation at a European level more efficient as regards the confiscation of proceeds of crime. Reference is made to the need to speed up procedures for judicial cooperation in combating organized crime and considerably shortening the time limits for submitting and responding to requests for action, thereby reinforcing the reference in the Action Plan for combating organized crime. It is worth detailing the actual obligations laid down in the Joint Action as these obligations are still of great importance in structuring the practice of international cooperation today.⁸

Table 2.1 Joint action on money laundering obligations

Article 1	(1): Member States must ensure – within certain limitations – that no reservations are made in respect of Articles 2 and 6 of the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime. As a result (among other things) confiscation of proceeds from criminal acts must be made possible on a large scale.
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⁶ OJEC 1998, L 333/1.

⁷ OJEC 1997, C 251/1.

⁸ The provisions of the Joint Action still apply, although some were revoked by the Framework Decision on money laundering. Most of the revoked provisions, however, have been replaced by comparable, but somewhat more explicitly formulated provisions. See second sub-heading of the section of this chapter.

Article 1	(2): Member States must make provision for the possibility of substitute value confiscation (in addition to or instead of confiscation of objects), both in national proceedings and in international cooperation. This includes requests for the enforcement of foreign confiscation orders.
Article 1	(3): Member States must make provision to allow suspected proceeds from crime to be identified and traced at the request of another Member State, if a criminal act is suspected of having been committed. Such assistance should be given at the earliest possible stage in an investigation.
Article 2	Each Member State must make provision for a user-friendly guide, including information about which authority can provide advice on legal assistance, and specifying what assistance a Member State is able to provide in confiscation cases. The guide must also include details on any significant restrictions on providing legal assistance and the information that requesting States must supply. Each Member State's guide will – with the intervention of the Council – be translated into all the official languages and distributed to the Member States, the European Justice Network (EJN) and Europol. Member States must keep the guide up-to-date.*
Article 3	Member States must give the same priority to all requests for legal assistance relating to asset identification, tracing, freezing, seizing and confiscation as is given to similar measures in national proceedings.
Article 4	Member States shall encourage direct contacts between the parties involved in the legal assistance. The cooperation must adhere to the following rules: <ul style="list-style-type: none"> • if a formal request for legal assistance is necessary, the requesting State must ensure that it is correctly prepared and observes the applicable requirements of the requested State; • Member States must not submit requests for legal assistance unless the precise nature of the assistance is known; • a request for legal assistance marked 'urgent' or indicating a deadline must explain the reason for the urgency or deadline; • if it is not possible to comply in full with a request for legal assistance, the requested Member State will make every effort to comply with the request in another way.
Article 5	(1): Member States will, insofar as this is not contrary to national law, take all necessary steps to minimise the risk of assets being dissipated. This includes measures that serve to freeze or seize assets expeditiously so that a subsequent request for confiscation is not frustrated.
Article 5	(2): If completion of a request for legal assistance requires an investigation to be conducted in a region other than the region dealing with the request, the Member State will ensure, insofar as this is not contrary to national law, that the necessary assistance can be provided without any need for a further written request.
Article 5	(3): If completion of a request for legal assistance requires further investigation on a related issue and the requesting State submits a supplementary written request, the requested State will, insofar as this is not contrary to national law, expedite execution of such supplementary request.

- Article 6** This Article sums up a number of measures that serve to guarantee international cooperation in general. Under these measures:
- Member States will acquaint their judiciary with 'best practices' in international cooperation in asset recovery cases;
 - Member States will ensure that the parties involved in international cooperation receive appropriate training;
 - The Presidency and interested Member States will organise seminars to promote and develop 'best practices' and to encourage compatibility between the various procedures.

Note: * This user-friendly guide resembles the 'Statements of good practice' that member states have made, or have to make, based on the Joint Action on good practice in mutual legal assistance in criminal matters, OJEC 1998, L 191/1. For these statements, see Council document SN 1371/00.

This summary shows that the Joint Action on money laundering contains a constellation of legal and practical standards and principles designed to guarantee effective and efficient international cooperation in confiscation cases. The next issue is how it has been implemented in practice.

Empirical material on the practical operation of these legal and practical standards and principles is available in the form of the evaluation study conducted on the basis of the Joint Action establishing a mechanism for evaluating the application and implementation at national level of international undertakings in the fight against organized crime.⁹ The first evaluation exercise that took place based on the Joint Action addressed 'mutual legal assistance and urgent requests for the tracing and seizure of assets'.¹⁰ Given the importance of seizure for international cooperation in asset recovery cases, the results of this evaluation exercise are relevant to the present study.

The evaluation study was conducted by studying the situation in all the then member states, *inter alia*, by means of a questionnaire and working visits. Based on the results, reports on all member states were issued.¹¹ After these reports were completed, the Council of the European Union adopted a final report on 28 May 2001.¹² This report provides a reasonably positive overview of legal assistance in the European Union but makes several recommendations for improving existing practices. Specifically as regards international cooperation in confiscation cases, these recommendations have a clear overlap with the principles and standards included in the Joint Action on money laundering. More specifically, the Council insists upon: early and unconditional ratification of the conventions relevant to legal

⁹ OJEC 1997, L 344/7.

¹⁰ 'Final Report on the first evaluation exercise – mutual legal assistance in criminal matters', published in OJEC 2001, C 216/14.

¹¹ These reports can be found on the Council's website: <http://consilium.europa.eu>.

¹² 'Final Report on the first evaluation exercise – mutual legal assistance in criminal matters', published in OJEC 2001, C 216/14.

assistance;¹³ the need for an accelerated procedure for tracing bank accounts;¹⁴ fast, efficient and, where possible, informal legal assistance procedures, and provisions to ensure that a specific measure applied at the request of another member state is not executed less efficiently than the same measure in a domestic procedure;¹⁵ the exchange of 'best practices' with the aim, among other things, of improving cooperation between member states;¹⁶ and the desirability of developing and making available a standard form for outgoing requests for legal assistance.¹⁷

Framework Decision on Money Laundering

The Framework Decision on money laundering, the identification, tracing, freezing, seizing, and confiscation of instrumentalities and the proceeds of crime¹⁸ ('Framework Decision on money laundering'), adopted by the Council on 26 June 2001, directly builds on the Joint Action on money laundering. Under Article 5 of the Framework Decision on money laundering, a number of the provisions – Articles 1, 3, 5 (1) and Article 8(1) – of the Joint Action on money laundering are revoked, while the Framework Decision prescribes largely similar, but somewhat more tightly formulated, obligations or obligations expressed in more mandatory terms.¹⁹ A different approach is taken for the obligations of Article 1(3) and Article 5(1) of the Joint Action, which have not been included (even in an adapted form) in the Framework Decision on money laundering. Essentially these concern the obligations for member states, at the request of another member state, to identify and trace suspected proceeds of crime and to take all measures to minimize the risk of assets being dissipated. These obligations were explicitly included in the initial proposal for the Framework Decision.²⁰ However, it was later decided to include these obligations in the Framework Decisions on mutual recognition such

¹³ Compare Recommendation 1 and Article 1(1), Joint Action on money laundering.

¹⁴ Compare Recommendation 3 and Article 1(3), Joint Action on money laundering.

¹⁵ Compare Recommendations 5, 8 and 15, and Articles 3, 4 and 5(2) and (3), Joint Action on money laundering.

¹⁶ Compare Recommendation 7 and Article 6, Joint Action on money laundering.

¹⁷ Compare Recommendation 9 and Article 4, Joint Action on money laundering.

¹⁸ OJEC 2001, L 182/1.

¹⁹ An example of such a tightening of the rules is the replacement of the words 'in minor cases' in Article 1(2) of the Joint Action on money laundering by 'that value would be less than EUR 4000' in Article 3 of the Framework Decision on money laundering. The time limit for transposing the Framework Decision used in Article 6(1) of the Framework Decision on money laundering is an example of more mandatory terms in comparison to the limited open-end arrangement used in Article 8(2) of the Joint Action on money laundering.

²⁰ Council document 10232/00. See also Council documents 9903/00 and 9903/00 ADD 1.

as the Framework Decision on freezing property or evidence²¹ and the Framework Decision on mutual recognition of confiscation orders.²² These legal instruments, however, do not include an obligation with respect to the tracing and identification of suspected proceeds of crime. It is unclear why the Framework Decision does not provide for an equivalent of this obligation. The provisions in the Joint Action on money laundering that have not been revoked are, for that matter, still in force.²³

Framework Decision on Freezing Property or Evidence

The Framework Decision on the execution in the European Union of orders freezing property or evidence (also referred to as the Framework Decision on freezing property or evidence, or the Framework Decision on freezing) was adopted on 22 July 2003.²⁴ This Framework Decision reflects the view commonly held within the European Union that mutual recognition is the 'cornerstone' of judicial cooperation in Europe.²⁵ The Framework Decision on freezing lays down rules whereby a member state must recognize and execute on its territory a freezing order issued in criminal proceedings by a judicial authority of another member state (under Article 1).

The Framework Decision aims to establish a simplified procedure for executing orders to freeze property or evidence in member states other than the member state in which the relevant decision was taken. With respect to the confiscation of the proceeds of crime, this means that it should be relatively easy to seize property deriving from a criminal act or, as the case may be, property that has a value corresponding, either wholly or partially, to such proceeds. The most important features of this simplified procedure are outlined below.

An important principle of the simplified procedure (according to Article 3(2)) is that the dual criminality requirement is not imposed with respect to quite a number of criminal acts, insofar as they are covered by the freezing order. If an act is not included in the relevant list, a member state can nevertheless apply the dual criminality requirement as a condition (under Article 3(4)). In outline, the simplified procedure is as follows. The judicial authority issuing the freezing order sends the freezing order, together with a standardized certificate, directly

21 Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence.

22 Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders.

23 The European Parliament insisted that these provisions would also be included in the Framework Decision on money laundering. See the report of 25 October 2000, PE 294.241. It cannot be inferred from public Council documents why the Council of the European Union did not adopt the European Parliament's suggestion. Compare Council document 14897/00.

24 OJEU 2003, L 196/45.

25 See V. Mitsilegas, 'The constitutional implications of mutual recognition in criminal matters in the EU' (2006) 43 *Common Market Law Review* 1277.

to the judicial authority in the other member state authorized to execute the order (under Article 4). The order will subsequently be executed immediately, unless one of the exhaustive grounds for refusal listed in Article 7 is present, or one of the exhaustive grounds for suspension listed in Article 8, applies. Under Article 3(3), the decision whether to proceed with the execution must be taken 'as soon as possible and, whenever practicable, within 24 hours of receipt of the freezing order'. If additional coercive measures, such as a search, must be taken for execution of the freezing order, the measures will be applied with due observance of the executing member state's relevant rules (under Article 5(3)). This usually means that a request for legal assistance, or a supplementary request, will be necessary if such coercive measures are to be applied.

In principle, the property will remain frozen until a request for execution of a confiscation order is received (according to Article 6(1) in conjunction with Article 10(1)), although restricting conditions may be imposed under certain circumstances. The Framework Decision on mutual recognition of confiscation orders, which is discussed below, also embeds the principle of mutual recognition with respect to execution, and so such execution can also be via a simplified procedure.

Framework Decision on Confiscation

The Framework Decision on the confiscation of crime-related proceeds, instrumentalities and property ('Framework Decision on confiscation') was adopted by the Council on 24 February 2005.²⁶ The most important objective of this Framework Decision is the harmonization of the powers of confiscation in the different member states of the European Union. The preamble of the Framework Decision on confiscation shows this harmonization to be important for two reasons. First and foremost, it is stated that, notwithstanding the obligations flowing from the Convention on laundering, search, seizure and confiscation of the proceeds from crime and the Framework Decision on money laundering, not all member states have provided (or adequately provided) for the opportunity to confiscate proceeds from criminal acts carrying a prison sentence of more than one year. Furthermore, the Framework Decision aims at ensuring that member states have effective rules governing the confiscation of proceeds from crime, *inter alia*, in relation to the onus of proof regarding the source of assets held by a person convicted of an offence related to organized crime. The obligations included in this Framework Decision further elaborate on the minimum conditions that member states must incorporate in their legislation.

At present, harmonization of the laws of the member states as regards confiscation only entails the imposition of confiscation sanctions by a court following proceedings relating to one or more criminal acts.²⁷ The Framework

26 OJEU 2005, L 68/49.

27 Compare Article 1 of the Framework Decision on confiscation.

Decision does not pertain to forms of confiscation outside the framework of criminal proceedings, such as civil forfeiture or civil recovery in British and Irish law.²⁸

Framework Decision on Mutual Recognition of Confiscation Orders

A Framework Decision that pertains to confiscation and international cooperation in confiscation cases is the Framework Decision on the application of the principle of mutual recognition to confiscation orders ('Framework Decision on mutual recognition of confiscation orders'), which was adopted on 6 October 2006.²⁹ The objective of this Framework Decision is clear from the preamble (paragraph 8):

The purpose of this Framework Decision is to facilitate cooperation between Member States as regards the mutual recognition and execution of orders to confiscate property so as to oblige a Member State to recognise and execute in its territory confiscation orders issued by a court competent in criminal matters of another Member State.

This Framework Decision builds on the Framework Decision on freezing property or evidence by developing a procedure whereby confiscation orders in many cases can and must be executed in another member state in a straightforward manner, in other words, without requiring complicated legal assistance requests. Implementing such a procedure obviously requires that the procedure be incorporated into domestic legislation in all the member states. However, it is also pointed out in paragraph 10 of the preamble that the proper practical operation of this procedure requires close liaison between the competent national authorities. Furthermore, member states are required to use all available means in order to identify the correct location of property, including the use of all available information systems.³⁰

The procedure as embodied in the Framework Decision on mutual recognition of confiscation orders is largely similar to the procedure of the Framework Decision on freezing property or evidence. Here, too, it is an important principle, set out in Article 6, that there is no requirement for dual criminality with respect to several criminal acts, insofar as they underlie the confiscation order. For other offences, the executing state may make the recognition and execution of a confiscation order subject to the condition (under Article 6(3)) that the acts giving rise to the confiscation order constitute an offence which permits confiscation under the law of the executing state. The procedure to be followed in such circumstances is for the confiscation order, together with the relevant certificate, to be sent, in accordance with the provisions of Articles 4 and 5, to the authority in the member

²⁸ Although the Framework Decision on confiscation, as evidenced by Article 3(4), does not preclude this either.

²⁹ OJEU 2006, L 328/59.

³⁰ Preamble para. 12.

state(s) authorized to execute the order. The order will subsequently be executed immediately, unless one of the grounds for refusal exhaustively listed in Article 8 is present, or one of the grounds for suspension exhaustively listed in Article 10 applies.

Although the Framework Decision on mutual recognition of confiscation orders is not discussed in detail here, it is still useful to touch upon a few particulars. First and foremost, it follows from the system of grounds for refusal that not every confiscation order should be eligible for the simplified form of execution, as referred to above, in another member state. Article 8(2)(g) includes as a valid ground for refusal the situation in which, in the opinion of the executing state, the confiscation order issued applies the extended powers of confiscation referred to in Article 2(d)(iv), in other words, powers going beyond those referred to in Article 2(d)(i-iii). This means refusal is possible, providing it does not concern confiscation of the proceeds of a criminal act (or a wholly or partly corresponding value), confiscation of instrumentalities with respect to that criminal act, or another form of confiscation as referred to in Article 3(1) and (2) of the Framework Decision on confiscation.³¹ Mutual recognition, therefore, is not mandatory for every possible confiscation order.³²

A much debated topic when the Framework Decision on mutual recognition of confiscation orders was being established was 'asset sharing'. The final version of the relevant regulation was laid down in Article 16.³³ Insofar as the execution pertains to an amount of money the proceeds will, in principle, be shared on a 50-50 basis between the issuing state and the executing state. If the amount obtained is below €10,000 the entire amount will accrue to the executing state. There are two options if the executing state obtains property from the execution: either the property will be sold, after which the sale proceeds will be divided in accordance with the above allocation formula; or the property will be transferred to the issuing state. In principle, it is the executing state's decision as to which option to pursue.³⁴ The issuing and executing states may alternatively jointly agree to another division or allocation.³⁵ It should be noted with respect to asset sharing that the costs of the execution will not be refunded. Other than in special cases, these costs will be borne by the executing state under Article 20.

³¹ The first two forms of confiscation have also been included in Article 2 of the Framework Decision on confiscation, but only as far as it concerns acts carrying a prison sentence of more than one year. As regards confiscation as meant in Article 3(2) of the Framework Decision on confiscation, it must be pointed out that, according to the fourth paragraph of that Article, such confiscation can also take place in a non-criminal procedure.

³² Compare also COM(2008) 766 final, p. 5.

³³ The explanation given in the main text of this provision is merely an outline of the possibilities. Compare Article 16(2)(c) and (3) for special cases.

³⁴ Unless the confiscation pertains to an amount of money and the execution results in property being obtained. In that case, transfer of the property is only possible with the issuing state's consent.

³⁵ Article 16(4).

A noteworthy aspect lacking in the normal legal assistance treaties is a specific regulation for execution in more than one member state. Following an extensive debate, a detailed regulation to that effect was included in Article 5 of the Framework Decision on mutual recognition of confiscation orders. Briefly put, this enables execution in more than one member state on a relatively broad scale.

Council Decision Concerning Cooperation between Asset Recovery Offices

The Council Decision on cooperation between Asset Recovery Offices of the member states ('Decision on cooperation between Asset Recovery Offices') was adopted on 6 December 2007.³⁶ It concerns a decision as referred to in Article 34(2)(c) of the EU Treaty of 1992, which is not aimed at harmonizing the laws of the member states but essentially pertains to the structuring of day-to-day practice. The Decision on cooperation between Asset Recovery Offices follows the establishment of the Camden Assets Recovery Inter-Agency Network ('CARIN'), whose objectives include the task of establishing a network of central contact points for the purpose of recovering criminal money.³⁷ CARIN is an informal network and has no authority to take binding decisions. The Decision supports CARIN's initiative by placing EU member states under an obligation to establish central contact points. Based on Article 1(1) of the Decision, each member state is required to set up or designate a 'national Asset Recovery Office' ('ARO'). The task of each national ARO is essentially to facilitate the tracing and identification of proceeds of crime that may be seized or confiscated during criminal or civil proceedings. Although the intention of the initial draft decision was for each member state to have only one national ARO, Article 1(2) now allows for two AROs to be set up or designated. Even if other authorities in a member state are also charged with tracing and identifying proceeds of crime, the member state can only appoint a maximum of two AROs as contact points.

The purpose of the national ARO is to exchange information or 'best practices', either on request or otherwise (under Article 2(1)).³⁸ As regards the exchange of information, Article 3 of the Decision refers to the rules to be adopted pursuant to the Framework Decision on simplifying the exchange of information and intelligence between law-enforcement authorities of EU member states.³⁹ This Framework Decision pertains to police cooperation in the European Union, more specifically the exchange of information between police authorities. The exchange of information is restricted to information that can be obtained without the use

³⁶ Council Decision 2007/845/JHA (OJEU 2007, L 332/103).

³⁷ See <https://www.europol.europa.eu/content/publication/camden-asset-recovery-inter-agency-network-carin-manual-1665> (accessed 10 February 2013).

³⁸ Council Decision, Article 2(1).

³⁹ Council Framework Decision 2006/960/JHA of 18 December 2006 on simplifying the exchange of information and intelligence between law enforcement authorities of the member states of the European Union.

of coercive powers, and information exchanged cannot automatically be used as evidence in criminal proceedings. The reference to this Framework Decision indicates that the Decision on cooperation between Asset Recovery Offices is restricted to the exchange of information at a police level.⁴⁰ This information has to be useful in tracing and identifying proceeds of crime. Under Article 4 of the Decision, information may be spontaneously exchanged within the limits of the applicable national law of the member state supplying the information. Article 6 obliges the national AROs to exchange 'best practices' with respect to the tracing and identification of proceeds of crime.

As stated above, national AROs primarily have the task of facilitating cooperation in the exchange of information.⁴¹ This exchange may involve their relaying an incoming request to another authority within the same member state. Council documents pertaining to the Decision show, however, that the aim is for national AROs to be more than a post box and, therefore, to have the expertise needed to assist in the execution of requests.⁴² The structures and procedures of the national AROs, however, are not regulated. The status of the national AROs – administrative, law enforcement, judicial authority – is not of any relevance, providing it does not hamper cooperation.⁴³

The Decision on cooperation between Asset Recovery Offices obviously aims to promote international cooperation in asset recovery cases in a practical manner. Noteworthy, too, is that the reference to a 'civil procedure' in Article 1(1) makes it clear that cooperation should also be possible with member states using forms of non-conviction based confiscation such as civil forfeiture or civil recovery.⁴⁴ At the same time, however, the restrictions in this respect should not be overlooked. In contradistinction to the initial draft decision,⁴⁵ the responsibilities of the national AROs in the Decision are explicitly restricted to exchanging information at a police level.⁴⁶ In this way, the Decision ignores the fact that a

⁴⁰ This restriction brings along that there is no obligation to provide information and intelligence to be used as evidence before a judicial authority. There is also no right to use such information or intelligence for that purpose. Where a member state has obtained information or intelligence, and wishes to use it as evidence before a judicial authority, it has to obtain consent of the member state that provided the information or intelligence. Council Framework Decision 2006/960/JHA of 18 December 2006 on simplifying the exchange of information and intelligence between law enforcement authorities of the Member States of the European Union, Article 1(4).

⁴¹ Council documents 7259/06 ADD 1, p. 5 and 6589/2/06 REV 2, p. 2.

⁴² Council document 5644/06, p. 2.

⁴³ Council Decision, Article 2(2).

⁴⁴ Compare Council document 15628/05 ADD 1, p. 5.

⁴⁵ Compare Article 2 under 1 of the initial draft decision, Council document 15628/05, which refers to the 'widest possible cooperation' between the national AROs.

⁴⁶ Because of this restriction it is not problematic for a member state that does not have a system of non-conviction based confiscation to cooperate with a member state that does have such a system.

significant part of international cooperation in confiscation cases takes place at a judicial level, for instance where such cooperation concerns the seizure of assets (by means of a European freezing order) or investigative measures. Viewed in that light, national AROs can play only a restricted role in cooperation, or in any case a more restricted role than CARIN envisages. Member states can, of course, decide at their discretion to expand the responsibilities of their national AROs. The possibility of having two national AROs in a member state also raises questions since this arrangement could easily result in a division of competences, which in turn could be a complicating factor in cooperation.⁴⁷ Given the limited mandate of the national AROs, it is also somewhat surprising that no provision has been made for the designation of only one national ARO. Council documents do not reveal why the possibility of designating two national AROs in one member state was created, other than to reflect pre-existing arrangements.

In a report in 2011, the Commission expresses general satisfaction regarding the manner in which member states have executed the Decision on cooperation between Asset Recovery Offices.⁴⁸ The report states that most national AROs employ relatively few staff, and that in practice their opportunities to gather financial data in particular are limited. It also points out that the infrastructure for a fast and, importantly, entirely secure exchange of information is lacking, although bodies such as Europol are working on this problem.

Other Initiatives and Instruments

No Specific Legal Instrument for the Exchange of Information

The initiatives and instruments described above are specifically aimed at confiscation cases and international cooperation in confiscation cases. It is remarkable that the emphasis is on the possibilities of (prejudgment) seizure, including tracing and identifying assets, and on executing confiscation orders. Exchanging information relevant to the imposing of confiscation orders is not an area of special attention in that respect, as explained below. The Decision on cooperation between Asset Recovery Offices seems to be breaking this tradition because it pays explicit attention to the exchange of information, both on request and spontaneously. It should, however, be pointed out that, with regard to the exchange of information on request, this Decision seeks to tie in with the Framework Decision on simplifying the exchange of information and intelligence

⁴⁷ In that respect, see also Council document 5644/06, p. 2.

⁴⁸ Report from the Commission to the European Parliament and to the Council based on Article 8 of the Council Decision 2007/845/JHA of 6 December 2007 concerning cooperation between Asset Recovery Offices of the Member States in the field of tracing and identification of proceeds from, or other property related to, crime (COM(2011) 176 final).

between law-enforcement authorities in EU member states,⁴⁹ even though this Framework Decision is not specifically tailored to asset recovery cases.

An explanation for the low profile assigned to the exchange of information could be that the gathering of information mainly occurs during the criminal investigation underlying the criminal proceedings and this is also when the confiscation order is made.⁵⁰ This suggests that at the EU level there is no strict distinction between 'traditional' legal process and financial information gathering. The gathering of information for the purposes of deciding whether to issue a confiscation order must be done on the basis of 'normal' instruments for legal assistance and international cooperation.

A case in point is the Framework Decision on the European evidence warrant for obtaining objects, documents and data for use in proceedings in criminal matters.⁵¹ This Framework Decision introduces the principle of mutual recognition with respect to member states' obtaining evidence. Neither the provisions relating to the evidence warrant, nor the Explanatory Memorandum to the Framework Decision or the draft Framework Decision indicate the extent to which the evidence warrant is meant to gather information for the purpose of making confiscation decisions. The same applies in the case of the Framework Decision on simplifying the exchange of information and intelligence between law-enforcement authorities in EU member states.

The lack of a Framework Decision for gathering information for the purpose of making confiscation decisions raises the question as to whether gathering that information can be seamlessly integrated into the 'normal' set of instruments. Or, to phrase it differently, can the desired gathering of information specifically for the purpose of confiscation decisions be interpreted as information gathering for the purpose of a criminal case? There are potentially two key obstacles. First, information that is useful for confiscation decisions is not necessarily relevant to the criminal case itself, in other words for the decision about the suspect's criminal responsibility. This may include information needed, for example, to calculate the total amount of criminal money obtained, including calculations not based on the proceeds of each criminal act but instead on calculations of the results of activity (or even presumed activity) over a period of time.⁵² Secondly, it is

⁴⁹ Council Framework Decision 2006/960/JHA of 18 December 2006 on simplifying the exchange of information and intelligence between law enforcement authorities of the Member States of the European Union.

⁵⁰ Compare Council recommendation of 25 April 2002 on improving investigation methods in combating organized crime: simultaneous investigations into drug trafficking by criminal organizations and their finances/assets, OJEC 2002, C 114/01. This document also recommends seeking to determine the proceeds of drug trafficking organizations from the start of the criminal investigation.

⁵¹ OJEU 2008, L 350/72.

⁵² Calculations covering a period of time are often used for forms of confiscation allowing a shift of the burden of proof. Compare in this respect Article 3(2) of the Framework Decision on confiscation.

important to note that in some legal systems the confiscation order is imposed in a procedure that is more or less separate from the 'main' criminal procedure. Such a procedure could take place, or still be ongoing, after final judgment on the indictment has been issued. These two peculiarities should not be taken to mean that international cooperation on the exchange of information for the purpose of confiscation decisions is problematic in each and every case. Empirical research has not found international cooperation to be hampered in this respect.⁵³ It should also be pointed out that the question of whether cooperation takes place in a particular case depends in part on the legal instrument invoked, the wording used in that legal instrument and the requested state's interpretation of the wording. One factor in that interpretation may be that the Decision on cooperation between Asset Recovery Offices takes it as self-evident that the exchange of information in asset recovery cases can take place on the basis of normal legal instruments (regarding police cooperation).

Legal Assistance in the European Union

Although mutual recognition is viewed as the cornerstone of international cooperation in criminal cases within the European Union, much of this cooperation currently still takes place by way of traditional legal assistance. This legal assistance is based first and foremost on the various international treaties, while there is also the Convention on Mutual Assistance in Criminal Matters between the member states of the European Union of 29 May 2000.⁵⁴ This Convention was supplemented by a Protocol on 16 October 2001,⁵⁵ and both have now entered into force (on 23 August 2005). Although these documents do not contain specific provisions with respect to international cooperation in asset recovery cases, that does not alter the fact that the Protocol in particular can be of special importance in such cooperation. Indeed the Protocol contains a specific procedure for legal assistance relating to the gathering of information on bank accounts for the purposes of combating economic crime, money laundering and organized crime. In general terms, this procedure allows information on bank accounts and transactions on specific bank accounts during specific periods of time to be obtained. The legal assistance can also involve monitoring possible future transactions on a bank account.

There are several bodies in the European Union that, each in their own way, seek to promote efficient processes for legal assistance, regardless of whether the legal assistance is based on the Convention or the Protocol. These are Europol, the European Judicial Network ('EJN') and Eurojust.

⁵³ M.J. Borgers and J.A. Moors, 'Targeting the proceeds of crime: Bottlenecks in international cooperation' (2007) 15 *European Journal of Crime, Criminal Law and Criminology* 1.

⁵⁴ OJEC 2000, C 197/1.

⁵⁵ OJEC 2001, C 326/1.

One of Europol's tasks is to promote effective cooperation between member states in preventing and combating various serious offences.⁵⁶ The exchange of information via liaison officers is one of the available means. The task of Europol's Criminal Assets Bureau is to assist member states in locating assets outside national borders, with an aim of freezing these assets. In addition, the Bureau supports the investigations undertaken by member states and can assist joint investigation teams. The focus in performing this task seems to be on coordinating contacts between the responsible police and judicial authorities in the member states and on the exchange of information. This entails facilitating cooperation between the member states rather than seeking to replace the existing legal assistance procedures.

The EJN⁵⁷ and Eurojust⁵⁸ are both responsible for promoting international judicial cooperation within the European Union. One of the important tasks in this respect involves ensuring that the appropriate people in the various member states are brought into contact with each other. EJN uses a network of contact points in the member states to fulfil this task, while Eurojust is a centralized organization with seconded magistrates. International cooperation in confiscation cases is not an area of special attention for either EJN or Eurojust.

Synthesis

The standards and minimum standards applying within the European Union with respect to proper international cooperation in confiscation cases can be represented functionally, based on the various European instruments and initiatives discussed in this contribution. The foundations for this cooperation are contained in the Joint Action on money laundering and its successor, the Framework Decision on money laundering. These two foundations (stripped of all details and further conditions),

⁵⁶ Council Decision of 6 April 2009 establishing the European Police Office (Europol) (2009/371/JHA) Article 3: 'The objective of Europol shall be to support and strengthen action by the competent authorities of the Member States and their mutual cooperation in preventing and combating organised crime, terrorism and other forms of serious crime affecting two or more Member States.'

⁵⁷ See Council Decision 2008/976/JHA of 16 December 2008 on the European Judicial Network.

⁵⁸ Under the Treaty on European Union, Article 85 requires Eurojust 'to support and strengthen coordination and cooperation between national investigating and prosecuting authorities in relation to serious crime affecting two or more Member States' while Article 86 states that 'in order to combat crimes affecting the financial interests of the Union, the Council, by means of regulations adopted in accordance with a special legislative procedure, may establish a European Public Prosecutor's Office from Eurojust'. See also Council Decision 2009/426/JHA of 16 December 2008 on the strengthening of Eurojust and amending Decision 2002/187/JHA setting up Eurojust with a view to reinforcing the fight against serious crime.

taken alongside the recommendations in the final report of the evaluation exercise regarding combating organized crime, require member states to comply with the following obligations:

Table 2.2 European obligations to cooperate in confiscation cases

A	Member States must provide for ample confiscation possibilities by law, including the possibility of value confiscation.
B	Member States must make provisions for the possibility of tracing suspected proceeds from crime at the request of another Member State* – <i>inter alia</i> by means of investigating bank accounts and bank transactions – and for freezing the assets concerned pending the outcome of confiscation proceedings.
C	<p>Member States must, in a number of ways, proceed expeditiously as regards legal assistance with respect to the identification, tracing, freezing, seizing and confiscation of assets. Among other things, it is important that:</p> <ul style="list-style-type: none"> • the same priority is given to legal assistance requests as is given to similar measures in national proceedings; • formalities and any necessary supplementary requests for legal assistance are dealt with as soon as possible; • the requesting State is adequately informed about the processing of the legal assistance request and possible obstacles; • Member States requesting legal assistance from another Member State ensure that the request is specific and substantiated, in accordance with applicable regulations; • Member States take steps to guarantee efficient responses to legal assistance requests, <i>inter alia</i>, by providing a user-friendly guide, promoting direct contacts between the parties involved and providing appropriate training.

Note: * As noted under the second sub-heading of the second section of this chapter, the provision to that effect was removed from the Joint Action by the Framework Decision on money laundering, without being replaced by a similar obligation. It may be, however, that the removal of this obligation was unintentional.

Aspects of the other Framework Decisions discussed in this chapter build on this group of obligations. The Framework Decision on confiscation further substantiates what is set out above under A in Table 2.2. The Framework Decision on freezing property or evidence aims – by replacing legal assistance by mutual recognition – to guarantee the possibility of prompt seizing and, in doing so, ties in with what is set out under B and C. The standardization of the manner in which a freezing order is given also promotes what is set out under C. Along the same lines, the Framework Decision on mutual recognition of confiscation orders ties in with what is set out under B and C. In addition to these Framework Decisions, the Protocol to the Convention on mutual assistance in criminal matters between the member states of the European Union is important for identifying assets and so can be linked to what is set out under B. At the European level, the facilitating role of Europol, EJN and Eurojust is also important with regard to the execution

of, and response to, requests for legal assistance. The national AROs referred to in the Decision on cooperation between Asset Recovery Offices have an important facilitating role to play, specifically as regards the exchange of information at a police level. The setting-up or designation of AROs, therefore, is linked to what is set out under C, albeit that it pertains only to police cooperation and not judicial legal assistance. The exchange of ‘best practices’ by AROs ties in with what is set out under C.

If the various obligations discussed above are compared to the possibilities laid down in various ‘classical’ international treaties on cooperation in criminal cases (for instance: the (Council of Europe’s) European Convention on Mutual Assistance in Criminal Matters⁵⁹ and the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union⁶⁰), European legislation can be seen to a greater or lesser extent to be consistent with existing treaty obligations. This does not mean, however, that the added value of the European regulations vis-à-vis the treaty obligations is modest. The European regulatory framework has a clear added value in two respects. First, the European regulations are related in part to how international cooperation is structured (as set out under C above). Secondly, the European regulations are constructed in part around the principle of mutual recognition, which aims to simplify and accelerate international cooperation.

To a certain extent, therefore, the legal instruments referred to in this chapter provide assurance that member states will ultimately comply with the obligations as laid down in the Joint Action on money laundering and the Framework Decision on money laundering. Of course, this requires the Framework Decisions discussed here to be implemented correctly – and the implementation legislation to be correctly executed – as well as requiring the Protocol and the Decision to be applied through national legislation. This also means that sufficient tools and resources must be available to enable compliance with the various obligations. The requirements for an expeditious and efficient response to legal assistance requests have been tightened further by the requirement that mutually recognized decisions be promptly executed. In that sense, the obligations flowing from the Joint Action on money laundering and the Framework Decision on money laundering have been intensified.

Overall, European legislation can be seen as comprising a reasonably coherent structure of regulations with respect to legal instruments for and organizational aspects of international cooperation. These regulations obviously also have their limitations. With a view to the practice of international cooperation in confiscation cases, it is useful to discuss two of these limitations separately.

⁵⁹ European Convention on Mutual Assistance in Criminal Matters, Strasbourg, 20 April 1959 (CETS 30).

⁶⁰ Council Act of 29 May 2000 establishing in accordance with Article 34 of the Treaty on European Union the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union, OJEC 2000, C 197/1.

First, the regulations as regards the organizational aspects are relatively modest in scope. At present, they are limited to a few provisions with respect to, *inter alia*, the prioritization of legal assistance requests and the provision of information and advice. Detailed regulations on various components of day-to-day practice – the available capacity, the manner in which contacts are established and so on – are lacking. The Decision on cooperation between Asset Recovery Offices, however, marks an important step towards a system of national AROs and contact points to facilitate international cooperation in asset recovery cases. Yet, at the same time, the AROs' mandate is fairly limited.

Secondly, European regulations pay little attention to legal safeguards for interested parties. Although several Framework Decisions stipulate that member states must put the necessary legal remedies in place,⁶¹ judging by the documents pertaining to the various European legal instruments, the issue of the general system of legal protection is barely addressed. It is, for instance, debatable whether it is reasonable that a Dutch party wishing to oppose, say, the execution of a Spanish freezing order in the Netherlands can only complain about the substantial reasons of that freezing order in Spain. From a practical viewpoint, it will not be easy for the Dutch individual – not least because of the language barrier – to obtain proper assistance or legal representation in Spain.

It should also be pointed out that, on a number of issues, no specific obligations as regards international cooperation in asset recovery cases have yet been set. This applies first and foremost in the case of the exchange of information relating to the making of confiscation decisions. This exchange needs to take place on the basis of the 'regular' legal instruments, including conventions on mutual assistance. The bottlenecks that can result from this have been outlined under the third heading in this chapter. However, the Protocol to the Convention on mutual assistance in criminal matters between the Member States of the European Union introduced a regulation, partly to combat laundering, that allows information to be obtained on bank accounts and bank transactions.⁶² The Decision on cooperation between Asset Recovery Offices, too, provides some practical rules for exchanging information at a police level in asset recovery cases. Secondly, there is no regulation in European legislation for forms of extrajudicial confiscation, such as settlement pursuant to Article 511c of the Dutch Code of Criminal Procedure.⁶³ Thirdly, the

⁶¹ See, for example, Article 11 of the Framework Decision on freezing property or evidence.

⁶² Protocol to the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union established by the Council in accordance with Article 34 of the Treaty on European Union (Official Journal C 326 of 21.11.2001) Articles 1 and 2.

⁶³ The Prosecutor may, as long as the investigation in the case is not closed, enter into a written settlement with the accused or convicted person for them to pay a sum of money to the state or to transfer of property in partial or total fulfilment of Article 36e of the Criminal Code for the confiscation of an illegally obtained asset.

European legal instruments are barely tailored for cooperation with respect to forms of confiscation other than post-criminal conviction confiscation. Powers of civil forfeiture or civil recovery for example are, therefore, not taken into account. This is somewhat surprising because although the various Framework Decisions consider confiscation a sanction imposed for one or more criminal acts, Article 3(4) of the Framework Decision on confiscation allows scope for confiscation in a non-criminal context. It is also remarkable in this respect that the Decision on cooperation between AROs regards cooperation in the area of non-conviction based forfeiture as fairly self-evident.

Conclusion: Looking to the Future

How will the collection of European rules on cooperation in asset recovery cases discussed above develop in the future? Several comments may be offered, based on the Commission's communication entitled *Proceeds of organized crime: Ensuring that 'crime does not pay'* and the recent proposal for a Directive on the freezing and confiscation of proceeds of crime in the European Union.⁶⁴ These documents set out several ambitions for furthering European policy on recovering the proceeds of crime. The draft Directive aims to make it easier for member states to confiscate and recover the profits from cross-border serious and organized crime, by setting minimum rules for member states with respect to freezing and confiscation of criminal assets through direct confiscation, value confiscation, extended confiscation, non-conviction based confiscation (in limited circumstances) and third-party confiscation. It is true that this harmonization of the member states' freezing and confiscation regimes facilitates mutual trust and effective cross-border cooperation.⁶⁵ Nevertheless, it is striking that hardly any new legislation is being proposed as regards the cooperation between member states. Instead, in the Commission's communication the focus seems to be on improving the practical execution of cooperation, while also promoting closer contacts between AROs and improving the opportunities to exchange information. This ambition ties in thoroughly with what has emerged in this chapter: current European legislation forms a reasonably coherent structure of regulations with respect to legal instruments for and organizational aspects of international cooperation. What really matters, therefore, is for good use to be made of this structure.

⁶⁴ COM(2011) 766 final; COM(2012) 85 final.

⁶⁵ COM(2012) 85 final, p. 4.